

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. **2004B032**

---

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

---

**CLEMSON D. GROVE,**  
Complainant,

vs.

**DEPARTMENT OF LABOR AND EMPLOYMENT, OFFICE OF FIELD OPERATIONS,  
WORKFORCE DEVELOPMENT PROGRAMS,**  
Respondent.

---

THIS MATTER came on for hearing on February 24, 2004, in the offices of the State Personnel Board before Administrative Law Judge Mary S. McClatchey. Complainant appeared pro se. Respondent appeared through Andrew Katarikawe, Assistant Attorney General.

**MATTER APPEALED**

Complainant, Clemson D. Grove ("Complainant" or "Grove") appeals his termination from employment by Respondent, Department of Labor and Employment, Office of Field Operations, Workforce Development Programs ("Respondent" or "WDP"). Complainant seeks reinstatement and back pay.

For the reasons set forth below, Respondent's action is **affirmed.**

**ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's disciplinary action against Complainant was arbitrary, capricious or contrary to rule or law;
3. Whether attorney fees are warranted.

**FINDINGS OF FACT**

**General Background**

1. Complainant was employed at WDP as a Labor and Employment Specialist II ("L & E II"). He was a disabled veterans' outreach specialist, charged with assisting veterans with job

readiness and job placement.

2. Grove's position requirements were to make contacts with veterans; make contacts with employers; set up interviews; assign veterans to case management or other intensive services as needed; and enter information into JobLink, the computer system utilized for matching veterans to available jobs and for tracking services rendered.
3. All L & E II's and I's were required to meet numerical goals for veteran contacts, job contacts, case management case loads, and other job functions.
4. Marie Valenzuela, a regional director for the Office of Field Operations, Grove's immediate supervisor, developed these goals. She utilized averages, taking into account rural and urban areas, the slow period in the fourth quarter of each year, and other variable factors.
5. Sixty percent of the WDP employee performance evaluations consist of objective, quantitative measures. Valenzuela was able to track those performance factors through computer records, including JobLink. In addition, she reviewed all quarterly reports contained in the reviews conducted by local veterans' employment representatives.
6. The federal government, through its veterans' affairs agency at the Department of Labor and Employment, funds and conducts annual audits of all WDP's nationwide.
7. In July 2001, May 2002, and January 2003, the federal veterans' affairs agency reviews of the Thornton office in which Grove worked identified Grove by name as an "area of concern" due to his low case management numbers.
8. Grove had health issues that required some hospitalization. The record does not reveal the nature of his problems. Once Grove had exhausted all available leave, Valenzuela approved unpaid leave to enable him to address his health issues. Grove never claimed he had a disability or requested any type of accommodation.

#### **July 2002 Corrective Action**

9. On July 15, 2002, Respondent issued Complainant a corrective action for the following:
  - A. failing to adhere to workplace policies governing signing in and out; leaving early without pre-approved leave on several occasions; taking lunch at the end of the day as a means of leaving early, in violation of agency rule DL 00-22; and
  - B. failure to adhere to the terms of a Performance Improvement Plan ("PIP") imposed on April 4, 2002. Specifically, he had failed to meet the minimum standards for any of the objectives set forth in the PIP. In each of the standards he performed at the following levels: Employer Contacts 52.0%; Job Development 47.4%; Entered Employment 25.0%; and Case Management 30.8%.

10. The July 2002 Corrective Action imposed the following on Complainant:

- A. he must review the work policies at issue, sign in and out, take lunch in the mid-day time frame, and obtain pre-approval for taking lunch in conjunction with attending a doctor's appointment;
- B. if he leaves early he must state the reason on the sign-in sheet;
- C. he must be in the office during core hours of 8:00 a.m. to 4:30 p.m.;
- D. his performance will no longer be rated on a team basis, but on an individual basis;
- E. he must meet minimum performance standards by the next interim performance review in October 2002;
- F. he will develop a plan of action that details the strategies he will take to increase enrollments in case management, and a timeline for the plan, by August 2002;
- G. he will make a minimum of three employer contacts per week and provide his supervisor with the employer contact logs monthly;
- H. he will obtain training in conducting basis assessments and completing applications;
- I. he will ensure that all veterans enrolled in other programs are also in case management;
- J. he will ensure that all veterans receive a reportable service; and
- K. he will document all work in JobLink.

11. Grove did not file a grievance challenging the corrective action.

12. Grove failed to comply with the terms of the corrective action.

13. On January 16, 2003, Joyce Johnson, Director of Field Operations, Employment and Training Programs, sent a letter to Complainant setting a pre-disciplinary meeting concerning his failure to comply with the terms of the July 2002 Corrective Action. The letter also referenced other employees' reports of Grove appearing to be under the influence of alcohol while at work and making suicidal remarks to co-workers.

14. At the January 28, 2003 pre-disciplinary meeting, Grove informed Johnson that he was on medication to assist him in refraining from drinking alcohol; that he had not been using alcohol; that the period of time from July 2002 to January 2003 was somewhat of a blur, and he couldn't tell her why he was unable to perform during that time; that in the last ten days he had improved his performance; that he felt he had been good at his job in the past and simply needed additional time to demonstrate he could perform at a satisfactory level; and that he felt he was depressed but was seeing a doctor to handle those issues.

15. On February 3, 2003, Johnson sent Grove a letter informing him she would postpone her decision regarding disciplinary action until his performance could be reevaluated at the end of March 2003. The R-6-10 meeting would re-convene on April 3, 2003.

16. Her letter also outlined his history of performance issues to date, including: in May 2002 the federal evaluation listed his sub-standard performance as an "Area of Concern," and that the

Adams County review of the Thornton office's performance listed his poor performance as an "Area of Concern" for the second year straight.

17. Valenzuela rated Grove at a Needs Improvement level for his annual performance review for the period April 1, 2002 through March 31, 2003. One example of the fundamental nature of his performance problems was his failure to adequately input the veterans' job skill sets into JobLink. This information forms the basis for linking veterans with available jobs; without it, such veterans are overlooked for an appropriate job match.
18. Following this evaluation, Valenzuela made significant efforts to assist Grove in improving his performance. She asked other staff to work with him. She sent Grove to another region to talk with another disabled veterans' outreach specialist to learn his strategies for enrolling clients in case management. She and numerous staff including Grove developed a form for identifying veterans with barriers to employment, who needed case management. She sent Grove to training.
19. Grove's performance improved somewhat after these actions by Valenzuela. His case management numbers increased, and he began to report more accurately on JobLink. The improved performance was not sustained, however, and after roughly two months it returned to substandard level.
20. Grove had difficulty "selling" the case management program to veterans. Grove contended that his numbers were low because the Thornton office was a stand-alone office, unaccompanied by other government programs. However, the other L & E specialists in his office did not have the same difficulty he did in meeting numerical goals.

#### **April 2003 Demotion**

21. On April 3, 2003, Johnson demoted Grove to Labor and Employment Specialist I based on his Needs Improvement rating, his continued performance at a substandard level, and the issues she and Grove addressed at the pre-disciplinary meeting in January 2003.
22. In her demotion, Johnson indicated she would confer with his direct supervisor in May to assess his performance.
23. Grove did not appeal the demotion.
24. On May 27, 2003, Valenzuela sent Johnson a summary of Grove's performance for the period April 1 through May 23, 2003. In her memo, Valenzuela pointed out that he had a zero percent accuracy level for case management file entries (out of 30 files reviewed all contained omissions, errors, or were not up-to-date), and his skill screens did not have correct codes for occupational titles. He had a 70.73% accuracy level for his JobLink entries. Grove exceeded his performance standards in the number of job development contacts and veterans placed in case management.

25. Valenzuela was also extremely concerned about Grove's continued violation of sick and annual leave policies. Grove's county functional supervisor, Danny Sisneros, had asked Valenzuela if Grove had submitted any leave slips to her recently. She informed Sisneros she was not aware of any absences since early April. Sisneros stated that Grove had been signing out for medical appointments and informing him that he had already sent the leave slips to Valenzuela. Valenzuela then checked the records and determined that Grove had taken the following leave without having submitted leave slips to her: May 1, one hour; May 5, six hours; May 6, three hours; May 7, one and a half hours; May 12, one half hour; May 14, one hour; May 16, six hours; May 20, four hours; May 21, one and a half hour; May 22, two hours.
26. Grove did not discuss or obtain prior approval from Valenzuela for any of this leave taken in May 2003, exceeding twenty-five hours.
27. Sisneros also reported to Valenzuela that Grove had been very impatient with customers, rushed them through their appointments, and regularly told customers that they would have to come back at a later time. When customers returned, they requested a staff member other than Grove.
28. Valenzuela concluded in her memo to Johnson that Grove was still performing at an unsatisfactory level.
29. On May 20, 2003, Johnson sent Grove a letter scheduling a pre-disciplinary meeting pursuant to Board Rule R-6-10. She set the meeting for May 28, 2003. Grove did not appear for that meeting and did not contact her to re-schedule it.
30. On June 2, 2003, Johnson sent Grove a second letter, rescheduling the meeting for June 6, 2003.
31. Johnson and Grove ultimately had the R-6-10 meeting on June 17, 2003. Grove elected not to have a representative present. Valenzuela did attend. At the meeting, Valenzuela reviewed Grove's continuing performance problems that she had outlined in her May 27 memo to Johnson, and reviewed the multiple hours of sick and annual leave he had taken without prior approval or notification, in violation of the Corrective Action and agency rules.
32. Grove's response to Valenzuela's comments was that he thought he was doing much better work and had signed out of the office. He did not deny having neglected to submit the leave slips.
33. On July 9, 2003, Johnson terminated Grove. In her letter, she cited his statements and the mitigating information he had provided her at their January, April, and June meetings. She reviewed his performance problems, as related above herein.

34. At hearing, Grove testified that he had "worked in a fog" for the last couple of years. He blamed the stressful work environment and his health for this situation. He also testified that his health situation and medication caused him such memory loss that he had to write things down to remember them. Lastly, he stated that he still had not yet obtained a confirmed diagnosis for the source of his health issues.

## **DISCUSSION**

### **I. GENERAL**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

#### **A. Burden of Proof**

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

### **II. HEARING ISSUES**

#### **A. Complainant committed the acts for which he was disciplined.**

Complainant was terminated for failing to perform competently, in violation of Board Rule R-6-9, 4 CCR 801. He argues that one of the primary reasons for his failure to meet the numerical criteria established for his position was the fact the Thornton office was a stand-alone office, unlike

other offices. For example, the Aurora office and numerous other offices also contain housing, food stamp, and other government programs, which increase the number of individuals that are likely to visit the veterans program office. However, he failed to support this argument with evidence at hearing. Grove also argued that his health problems contributed to his difficulties in performing at work. While it is very unfortunate that Grove was apparently unable to overcome his health issues, whatever they may be, the evidence demonstrated that Valenzuela provided him with all necessary unpaid leave in order to attend to his health issues.

Complainant committed the acts for which he was disciplined.

**B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.**

Arbitrary or capricious exercise of agency discretion can arise in only three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such a manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley*.

Respondent gave Grove a number of opportunities to improve his performance. Valenzuela first placed him on a performance plan, then imposed a corrective action. When Grove failed to comply with the terms of the corrective action, Johnson became involved in the disciplinary process. Johnson demonstrated compassion for Grove's situation in postponing her decision to impose discipline. Unfortunately, over time, it became clear that despite some short periods of improvement, Grove was unable to function at an acceptable level in the position over a sustained period of time. It was reasonable for the agency to determine that ultimately it had to terminate him.

**C. Attorney Fees and Costs are Not Warranted**

Respondent requests an award of attorney fees and costs against Grove. Attorney fees and costs are to be awarded if it is found that a personnel action or appeal thereof as instituted frivolously, in bad faith, maliciously, as a means of harassment or was otherwise groundless. Section 24-50-125.5, C.R.S.; Board Rule R-8-38, 4 CCR 801. Grove presented a vigorous defense in his cross-examination of witnesses and through his own testimony. He presented a number of arguments in his defense. There is no evidence he appealed his termination in bad faith or in a manner that comports with any of the enumerated factors in the statute. Therefore, the motion for fees and costs is denied.

DATED this \_\_\_\_ day of  
April, 2004, at

---

Mary S. McClatchey

Denver, Colorado.

Administrative Law Judge  
1120 Lincoln St., Suite 1420  
Denver, CO 80203

### NOTICE OF APPEAL RIGHTS

#### EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

### RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

### BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief



must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

#### ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

#### CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of **April, 2004**, I placed true copies of the foregoing **INITIAL DECISION AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Clemson D. Grove  
15057 East Iliff Drive  
Aurora, Colorado 80014

And in the interagency mail to:

Andrew Katarikawe  
Assistant Attorney General  
Employment Section  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

---

Andrea C. Woods